STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 1, 2005
v	No. 256299 Monroe Circuit Court
CHARLES EDWARD BENORE, Defendant-Appellant.	LC No. 03-033086-FC

Before: Cooper, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree murder, MCL 750.316, for which he was sentenced to imprisonment for life. We affirm.

Defendant admitted that he killed the victim in this case. The victim, Deborah Brown, had been defendant's girlfriend for approximately six years. On May 11, 2003, defendant took a knife from the kitchen and slit the victim's throat, causing her death. The victim's daughter, Michelle Brown, was present in the home at the time defendant committed the killing.

On appeal, defendant argues that defense counsel was ineffective for failing to effectively cross-examine and impeach Brown during her testimony at trial regarding her statement to police, which was inconsistent with her trial testimony. Defendant contends that, but for counsel's error, defendant would have been convicted of voluntary manslaughter rather than first-degree murder. Because the trial court did not conduct a *Ginther*[1] hearing, our review of defendant's ineffective assistance of counsel claim is limited to mistakes apparent on the record.[2] *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). In reviewing a claim of ineffective assistance of counsel, a trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[2] Defendant filed a motion in this Court to remand for an evidentiary hearing, but this Court denied the motion.

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), and that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

The decision to call or question witnesses is presumed to be a matter of trial strategy, and the failure to call or question a witness constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense that might have made a difference in the outcome of the trial. *People v Dixon*, 263 Mich App 393, 398; 668 NW2d 308 (2004). This Court will neither substitute its judgment for that of defense counsel regarding trial strategy matters, nor will it evaluate counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Contrary to defendant's contention, a review of the record reveals that defense counsel did effectively cross-examine and attempt to impeach Michelle Brown using the contents of her statement in the police report. During cross-examination, defense counsel was able to elicit testimony from Brown that she heard the victim accuse defendant of hiding surveillance cameras in her house and that she also heard the victim call and talk to the police on the telephone on the morning that she was killed. Brown's testimony was consistent with her police statement as well as with defendant's testimony that he killed the victim out of blind rage because she accused him of hiding surveillance cameras in her house and attempted to call the police. Under these circumstances, we conclude that defendant has not established that his trial counsel's performance fell below an objective standard of reasonableness with regard to these matters, and any failure to further cross-examine or impeach Brown did not deprive defendant of a substantial defense or affect the outcome of the proceedings. *Dixon*, *supra* at 398.

Defendant further contends that Brown's testimony that the victim was alive when Brown woke up, and that she responded when Brown wished her a happy Mother's Day, was inconsistent with her police statement, because in her statement to police, Brown did not mention these facts, she had told the police that she heard a loud noise and heard the victim call the police while she was still in bed. We disagree with defendant's contention that Brown's testimony regarding these matters was inconsistent with her police statement. We also observe that Brown, under the stress of discovering that her mother had been killed, may have failed to recount all the details of the events in her statement to the police. Moreover, during cross-examination, defense counsel addressed the details of Brown's statement to the police that defendant contends were inconsistent with her trial testimony, and Brown clarified and explained the statements. Furthermore, Brown's statement that she heard a noise while in the computer room is not necessarily inconsistent with her police statement that she heard a noise while she was in bed, she testified that she heard noises on two occasions. Moreover, the evidence to convict defendant of first-degree murder was overwhelming, as defendant admitted that he killed the victim by slashing her throat with a knife and leaving her to bleed to death. Under these circumstances, we hold that any minor inconsistencies between Brown's trial testimony and her police statement, unrelated to the actual murder, would not have contributed to a substantial outcome-determinative defense. *Dixon*, *supra* at 398.

Next, defendant argues that the trial court abused its discretion by admitting into evidence the allegedly gruesome photograph of the victim's naked body lying in a pool of blood. We disagree. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Houston*, 261 Mich App 463, 467; 683 NW2d 192 (2004). "Unfair prejudice" does not mean "damaging." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, mod and rem'd 450 Mich 1212 (1995). All evidence offered by parties is "prejudicial" to some extent, but the fear of prejudice does not generally render the evidence inadmissible. *Id*. Admission of gruesome photographs solely to arouse the sympathies or prejudices of the jury may be error requiring reversal. *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998). However, a photograph that is otherwise admissible for some proper purpose is not rendered inadmissible because of its gruesome details or the shocking nature of the crime. *Id.*

We agree with the trial court's ruling that the challenged photograph is more probative than prejudicial. The black and white photograph admitted in the instant case shows the victim's body lying on her back with her arms crossed and rested on her stomach and reveals a stab wound to her neck. The photograph was an accurate representation of the harm inflicted upon the victim because the testimony at trial established that defendant killed the victim by slashing her throat with a knife and that after he killed her, he repositioned her hands. In addition, the photograph was probative on the issue of defendant's intent to kill the victim and of the medical examiner's conclusion that the victim died as a result of exsanguinations. Moreover, the photograph was not particularly gruesome because its black and white form muted its graphic nature. As such, although the photograph of the victim was damaging or prejudicial to some extent, it was not so unfairly prejudicial that it should have been excluded under MRE 403. *Mills*, *supra* at 75; see also *People v Herndon*, 246 Mich App 371, 413-414; 633 NW2d 376 (2001) (finding no abuse of discretion in admitting the photographs of the victim and the crime scene because they were not unfairly prejudicial). Accordingly, we hold that the trial court did not abuse its discretion in determining that the probative value of the photograph regarding defendant's intent was not substantially outweighed by any danger of unfair prejudice, especially where the trial court only allowed one black and white photograph, out of a group of photos that included color photos, to be admitted into evidence. *Mills*, *supra* at 76. In addition, the mere fact that defendant admitted that he killed the victim and did not dispute the nature of the fatal wound, does not render evidence regarding these matters inadmissible. *Id*. at 71 (noting that the claim that evidence that goes to an undisputed point is inadmissible has been rejected in criminal cases). Also, the fact that the photograph accurately portrayed a brutal murder does not render evidence inadmissible. *Herndon*, *supra* at 413-414; see *Ho*, *supra* at 188. We find no error in the trial court's admission of the challenged photograph.

Next, defendant argues that he was deprived of due process and the opportunity to fully present a defense when the trial court erroneously sustained the prosecutor's hearsay objection to defendant's testimony concerning the victim's alleged accusations that defendant placed surveillance cameras in her house. Because defendant failed to preserve this issue, we review this issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Whether defendant's right to due process was violated is a question of law that we review de novo. US Const, Am V; Const 1963, art 1, § 17; *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999). In a criminal case, due process generally requires that a defendant have an opportunity to be heard in his defense, which includes the right to offer testimony. *People v McGee*, 258 Mich App 683, 699; 672 NW2d 191 (2003). In order "to establish a due process violation, a defendant must prove prejudice to his defense," and "whether an accused is accorded due process depends on the facts of each case." *Id*. at 700.

Defendant argues that the trial court erroneously sustained the prosecutor's hearsay objection because defense counsel was not offering the victim's statements to prove the truth of the matter asserted, but rather to prove defendant's state of mind, which was essential to his defense that he was provoked by the victim's false accusations and that he killed the victim in the heat of passion. The flaw in defendant's argument is that because the victim's statements were offered to prove defendant's state of mind, not "the declarant's," they do not fall within an exception to hearsay rule under MRE 803(3).[3] We recognize, however, that in order to avoid denying a defendant a fair trial, even hearsay is admissible when "critical" to a defense. See *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973) (When "constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.")

Even assuming that the hearsay rule is not applied in this case, we find no likelihood that the court's ruling denied defendant a fair trial. A review of the record shows that defendant was able to present to the jury his theory that he was provoked by the victim's false accusations and that he killed the victim in the heat of passion. The trial court's ruling only precluded defendant from further testifying about the victim yelling and screaming about the surveillance cameras and about the victim blaming defendant for wrecking her life, getting her in trouble, and making her lose her daughter. While the trial court sustained the prosecutor's objection to defendant's testimony concerning these specific insults or accusations allegedly made by the victim to defendant, defense counsel effectively obtained the substantive information from defendant's testimony regarding the victim's accusatory comments about defendant placing the surveillance cameras in her home and threatening to call the police to arrest defendant on the day she was killed. In light of this record, defendant cannot prove prejudice against his defense; he was allowed to present his theory of the case, that he was provoked. MRE 103(a). Accordingly, the trial court committed no plain error and defendant is not entitled to relief on this basis. *Carines*, *supra* at 763; *McGee*, *supra* at 700.

[3] Under MRE 803(3), a statement of a declarant's "then existing state of mind, emotion, sensation, or physical condition" is not excluded by the hearsay rule.

Next, defendant argues that the prosecutor committed misconduct during the trial by referring to the victim as the "victim" on twenty-four separate occasions and by allowing prosecution witnesses to refer to the victim as the "victim" on thirty-nine additional occasions. Defendant also contends that defense counsel was ineffective for failing to object to the prosecutor's alleged misconduct. We hold that defendant is not entitled to relief based on either contention.

We review an unpreserved claim of prosecutorial misconduct for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Claims of prosecutorial misconduct are reviewed case by case, and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 ns 5-7; 531 NW2d 659 (1995).

In the instant case, defendant failed to cite any authority to support his position that the prosecutor committed misconduct by referring to the victim as the "victim" or allowing his witnesses to refer to the victim as such. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Therefore, we consider the issue abandoned. See *People v Canter*, 197 Mich App 550; 496 NW2d 336 (1992); *People v Sowders*, 164 Mich App 36, 49; 417 NW2d 78 (1987).

In any event, we hold that the prosecutor's and the prosecution witnesses' references to the victim as the "victim" do not constitute plain error affecting defendant's substantial rights. *Ackerman*, *supra* at 448-449. The record indicates that defendant admitted killing the victim, and thus, referring to her as the "victim" was accurate and was not prejudicial to defendant. Moreover, defendant failed to show that the jury would have returned a verdict of manslaughter instead of first-degree murder if the prosecutor did not use the term "victim." In addition, had defendant raised the issue at trial, any prejudice caused by the challenged references could have been cured by a timely instruction. *Id.* at 449. As the prosecutor's references to the "victim" were proper, any objection would have been futile. Counsel is not required to make a frivolous objection or advocate a meritless position. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003). Accordingly, defendant's claim of ineffective assistance of counsel based on defense counsel's failure to object to the prosecutor's challenged misconduct is also without merit.

Next, defendant argues that the trial court erred by denying his motion for a directed verdict on the first-degree murder component of the open murder charge because there was insufficient evidence of premeditation and deliberation. Alternatively, defendant argues that the prosecution failed to present sufficient evidence necessary for first-degree or second-degree murder because the circumstances surrounding the killing showed that he committed the offense in the heat of passion based on adequate provocation, thus mitigating the crime to manslaughter. We review a trial court's decision on a motion for a directed verdict and an insufficiency of the evidence claim de novo to determine whether "the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001), citing *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999).

The elements of first-degree murder are that the defendant killed the victim and that the killing was "willful, deliberate, and premeditated." *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002), quoting MCL 750.316(1)(a). To show first-degree premeditated murder, some time span between the initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation. *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). Moreover, the interval between the initial thought and ultimate action should be long enough to afford a reasonable person time to take a "second look." *Id*. In determining whether a defendant acted with premeditation, the trier of fact may consider (1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted. *People v Moore*, 262 Mich App 64, 77; 683 NW2d 736 (2004). After reviewing the record in light of these factors, we conclude that there was sufficient evidence of premeditation and deliberation to deny defendant's motion for a directed verdict.

Here, the evidence shows that defendant and the victim had lived together for over six years. The night before the killing, defendant and the victim had a verbal argument regarding defendant hiding surveillance cameras in the house. During the argument, defendant commented that "the fastest way to kill a human being was to cut their throat." Earlier on the day of the killing, Michelle Brown overheard the victim calling the police on the telephone. The prior dispute between defendant and the victim could have provided a motive for the killing. Also, Brown testified that on the day of the killing, defendant went to the kitchen and walked over to where the wooden block of knives was located. Although Brown did not see defendant take a knife from the knife block, she saw defendant walk back to the bedroom and heard "crash noises." The brief walk from the kitchen to the bedroom would have given defendant time to take a "second look" at his intended conduct and thus supports a finding of premeditation. Moreover, defendant's actions after the murder support an inference of premeditation and deliberation. Rather than calling the Emergency Medical Service, defendant sat down at the kitchen table and told Brown to spend the day writing a will for defendant. Defendant also attempted to conceal the killing by locking the bedroom door, lying to Brown that the victim was sleeping in her bedroom, and instructing Brown to let the victim sleep and not go into her bedroom for at least twenty minutes after defendant left the house.

The circumstances surrounding the victim's killing also provide strong support for a finding of premeditation and deliberation. Dr. Cheryl Loewe, the medical examiner, who supervised the victim's autopsy, testified that the cause of death was exsanguinations or bleeding to death as the result of a six-inch long slash mark across the front of her neck. The major blood vessels on the neck were severed, and the airway or the trachea was completely cut in two. The wound on the left side of the victim's neck was so deep that it reached her spine, causing near decapitation. There were no defense wounds on the victim's arms or hands. Guy Nutter, a forensic scientist, testified that from analysis of all the bloodstains at the scene, Deborah was on the bed when she received the cut. A rational trier of fact could certainly infer that cutting a person's throat with a knife and leaving her to bleed to death is a deliberate, cold-blooded act that suggests premeditation. In sum, viewing the evidence in a light most favorable to the prosecution, we hold that the prosecution presented sufficient evidence from which a rational trier of fact could find that the essential elements of first-degree premeditated murder were proven beyond a reasonable doubt; therefore, the trial court properly denied defendant's motion

for a directed verdict. Consequently, defendant's insufficient evidence claim regarding first-degree or second-degree murder also lacks any merit.

Moreover, the evidence was sufficient to enable the jury to reject defendant's argument that the crime should be reduced to manslaughter. A person "who has acted out of a temporary excitement induced by an adequate provocation and not from deliberation and reflection" is properly convicted of voluntary manslaughter. *People v Mendoza*, 468 Mich 527, 535; 664 NW2d 685 (2003), citing *People v Townes*, 391 Mich 578, 590; 218 NW2d 136 (1974). The provocation necessary to reduce a murder to manslaughter "must be adequate, namely, that which would cause the reasonable person to lose control. Not every hot-tempered individual who flies into a rage at the slightest insult can claim manslaughter. The law cannot countenance the loss of self-control; rather, it must encourage people to control their passions." *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991) (citation omitted).

As the trial court noted, the evidence showed that defendant had a chance to reflect or control his passions after he obtained a knife in the kitchen and during his walk to the bedroom where he killed the victim. *Pouncey*, *supra* at 389. There was no evidence of a struggle, an attack by the victim, or any other occurrence that would prompt any unthinking use of the knife in the bedroom. *People v Jones*, 115 Mich App 543, 553; 312 NW2d 723 (1982). Further, defendant's intent to kill the victim can be inferred from the extent and severity of her injuries, which were so severe that her head was nearly severed from her body. Viewed most favorably to the prosecution, the evidence was sufficient to enable the jury to reject, as it did, defendant's claim that the killing resulted from reasonable provocation as to mitigate the homicide from first-degree or second-degree murder to voluntary manslaughter.

Finally, defendant argues that the trial court's failure to give the proper jury instruction on voluntary manslaughter deprived him of his right to a fair trial. Specifically, defendant argues that the instruction did not give the essential elements of voluntary manslaughter as set out in CJI2d 16.8. Defendant alternatively claims that defense counsel was ineffective for failing to object to these instructions. We disagree. Defendant failed to preserve this issue because he did not object to the voluntary manslaughter instruction at trial. Furthermore, defendant affirmatively approved the trial court's instructions to the jury. By expressly approving the jury instructions, defendant has waived this issue on appeal. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello